Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
HolstonConnect, LLC,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. _____
	)	
Nexstar Media Group, Inc.	)	
	)	
Defendant.	)	
	)	
	)	

EMERGENCY REQUEST FOR DESIGNATION AS "PERMIT-BUT-DISCLOSE" PROCEEDING

Complainant HolstonConnect, LLC ("HolstonConnect") respectfully requests that the Commission designate the above-captioned matter as a "permit-but-disclose" proceeding subject to section 1.1206 of the Commission's rules.

I. BACKGROUND

On March 5, 2019, pursuant to Sections 76.7 and 76.65 of the Commission's rules, HolstonConnect filed a complaint against Nexstar Media Group, Inc. ("Nexstar") for violating the Commission's rules requiring broadcasters to exercise "good faith" in negotiating retransmission consent agreements ("Complaint").

Among other arguments, HolstonConnect alleges in the Complaint that Nexstar's actions have had, and continue to have, the effect of impairing HolstonConnect's ability to deploy gigabit broadband infrastructure and services successfully in the rural East Tennessee region.

Retransmission consent proceedings under Section 76.65 are ordinarily treated as "restricted" proceedings, in which *ex parte* communications are generally prohibited by Section 1.1208 of the Commission's rules. This matter, however, involves several unusual aspects that suggest the public interest would be best served by allowing dialog with the Commission. Doing so would also be consistent with multiple prior Commission actions, as explained below.

II. LEGAL ARGUMENT

A. The Commission Can and Should Designate This Matter as a Permit-But-Disclose Proceeding

Under Section 1.1200(a) of the Commission's rules, the Commission may modify the *ex parte* status of a proceeding if "the public interest so requires."[1]

On multiple past occasions involving Section 76.65 retransmission consent complaints, the Commission has granted a party's request for designation of the matter as "permit-but-disclose."

For example, in October 2009, Mediacom Communications Corporation ("Mediacom") filed a retransmission consent complaint against Sinclair Broadcast Group ("Sinclair"), along with an "Emergency Request for Designation as 'Permit-But-Disclose' Proceeding."[2] In approving Mediacom's request, the Commission noted that the matter "raise[d] time sensitive policy issues," and that modified *ex parte* procedures were appropriate "to assure the staff's ability to discuss and obtain the information needed to resolve these issues expeditiously."[3] The Commission relied

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1 "Where the public interest so requires in a particular proceeding, the Commission and its staff retain the discretion to modify the applicable ex parte rules by order, letter, or public notice." 47 C.F.R. § 1.1200(a).

2 *Establishment of "Permit-But-Disclose" Ex Parte Procedures for Mediacom Communications Corporation's Retransmission Consent Complaint and Petition for an Emergency Order Granting Interim Carriage Rights*, Public Notice, 24 FCC Rcd 13675 (MB 2009)("2009 Mediacom *Ex Parte* Action").

3 *Id.*

upon the rationale of two prior decisions approving "permit-but-disclose" status for retransmission consent complaints.[4]

While these retransmission consent decisions are roughly a decade old, the Commission continues to rely upon them. In 2018, the Commission cited the aforementioned 2009 Mediacom action in support of a decision modifying the *ex parte* status of a dispute involving Starz Entertainment, LLC and Altice.[5]

B. Designation of this Matter as "Permit-but-Disclose" Furthers the Public Interest.

Like the requests for permit-but-disclose designation in the cases cited above, this Request "raise[s] time-sensitive policy issues" and seeks "to assure the staff's ability to discuss and obtain the information needed to resolve these issues expeditiously." As in those proceedings, HolstonConnect's Complaint against Nexstar – which includes a request for treatment on an expedited basis – demonstrates HolstonConnect's strong need for a speedy resolution of the dispute.

As explained in its Complaint, HolstonConnect is in the process of launching a new, competitive cable television service, as a necessary adjunct to its CAF II-supported deployment of gigabit broadband service in East Tennessee. Nexstar's ongoing intransigence with respect to

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4 "*Permit-But-Disclose" Ex Parte Procedures Established for Cebridge Acquisition, LLC d/b/a Suddenlink Communications' Emergency Retransmission Consent Complaint (CSR 7038-C) as well as for Sinclair Broadband Group, Inc.'s Emergency Petition for Declaratory Ruling and for Immediate Injunctive Relief,* Public Notice, 21 FCC Rcd. 13114 (MB 2006); *Comments Sought on Mediacom Communications Corporation's Emergency Retransmission Consent Complaint; Establishment of "Permit-But-Disclose" Ex Parte Procedures,* Public Notice, 21 FCC Rcd. 13114 (MB 2006)("*Mediacom I").*

5 *Establishment of "Permit-But-Disclose" Ex Parte Procedures for Starz Entertainment, LLC's Complaint Against Altice, USA, Inc.,* Public Notice, 33 FCC Rcd 966 (MB 2018), footnote 9.

reaching a reasonable broadcast carriage agreement will continue to delay and add cost to HolstonConnect's deployment plans, to the detriment of residents and businesses in East Tennessee.

HolstonConnect suggests that the Commission – and the general public – would be better served by giving Commission staff the flexibility to discuss the matter with the parties, which will enable the Commission to more efficiently and effectively obtain the information needed to resolve the dispute.

For example, Commission staff may benefit from additional information relating to the link between HolstonConnect's ability to deploy broadband, and the commercial impracticability of doing so without also offering cable service. The Commission may also wish to learn more about HolstonConnect's CAF-II support, and HolstonConnect's deployment obligations thereunder. Designation as "permit-but-disclose" would also enable the Commission may have a frank and efficient discussion with the parties concerning Nexstar's and other broadcaster's rates in the East Tennessee region, information that is confidential, yet highly relevant.[6]

Furthermore, HolstonConnect believes that the Commission should take Nexstar's failure to negotiate in good faith with HolstonConnect into account with respect to determining whether Nexstar's proposed merger with Tribune Media is in the public interest.[7] Designating this proceeding as a permit-but-disclose proceeding will facilitate critical public discourse in both this proceeding and the Nexstar-Tribune proceeding.

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[6] While such rate information may be included in confidential pleadings, the Commission would no doubt benefit from the ability to ask detailed questions about the information submitted.

[7] MB Docket No. 19-30.

In addition, as Mediacom noted in its reply brief in the 2009 Mediacom case, allowing *ex parte* communications in an earlier retransmission consent proceeding "clearly served the public interest by facilitating the submission of relevant information to the Commission not only by Mediacom and Sinclair, but also by other interested parties, including elected officials, consumers, and industry."[8] These considerations apply here as well.

Finally, HolstonConnect does not believe that a "permit-but-disclose" proceeding would negatively affect the conduct of the proceeding. As the Commission has found previously, allowing *ex parte* communication in retransmission consent disputes does not necessarily "bog down" the proceedings.[9] To the contrary, doing so will give Commission staff the flexibility to obtain all of the information needed to resolve this dispute quickly.

III. CONCLUSION

For the foregoing reasons, Complainant HolstonConnect requests that the Commission promptly designate this matter as a "permit-but-disclose" proceeding under Section 1.1206 of the Commission's rules.

Respectfully Submitted,

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March 13, 2019

[8] 2009 Mediacom *Ex Parte* Action, *supra* n.2, Reply Brief of Mediacom Communications Corp., filed Nov. 5, 2009 (referring to the Commission's designation of permit-but-disclose status in *Mediacom I, supra* n.4), Attachment A.

[9] 2009 Mediacom *Ex Parte* Action, *supra* n. 2

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2019, I caused a copy of the foregoing Emergency Request for Designation as Permit-But-Disclose Proceeding to be served by Federal Express, postage prepaid, upon the following:

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A copy was provided via electronic mail to the following:

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Jim Baller

March 13, 2019

ATTACHMENT A

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

Mediacom Communications Corporation,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	CSR Nos. 8233-C and 8234-M
Sinclair Broadcast Group, Inc.,	)	
	)	EXPEDITED TREATMENT REQUESTED
	)	
Defendant.	)	
	)	

To: The Commission

REPLY

Mediacom Communications Corporation ("Mediacom"), by its attorneys, hereby submits its Reply to the Opposition filed by Sinclair Broadcast Group, Inc. ("Sinclair") to Mediacom's emergency motion for designation of the above-referenced retransmission consent complaint and interim carriage request proceedings as "permit-but-disclose" under the Commission's *ex parte* rules. For the reasons set forth in its emergency motion and below, the Commission should act without further delay to designate the referenced matters as permit-but-disclose.

On October 22, 2009, Mediacom filed with the Commission a Retransmission Complaint and an associated Petition for an Emergency Order Granting Interim Carriage Rights. Concurrently, Mediacom filed its emergency motion requesting designation of these proceedings as "Permit-but-Disclose" under the Commission's *ex parte* rules. In support, Mediacom noted that grant of its request would facilitate and expedite the resolution of these proceedings by enabling communications between interested parties and the Commission regarding the issues presented and that there was direct precedent for granting the requested action, citing the

Commission's designation of Mediacom's 2006 retransmission consent complaint against Sinclair as permit-but-disclose.[1]

Sinclair, as it did in 2006, has opposed Mediacom's motion, arguing that designating the retransmission consent and interim carriage proceedings as permit-but-disclose would be "contrary to FCC policy" and would set a precedent "that would draw the agency into mediating potentially thousands of retransmission negotiations." The Commission did not find these exact same arguments persuasive in 2006 and should not do so now. Indeed, the record of the past three years establishes that the designation of Mediacom's 2006 retransmission consent complaint as permit-but-disclose did not "draw the agency" into mediating any new retransmission consent negotiations, let alone the thousands that Sinclair predicted in 2006 and that it again predicts in its current opposition.

Sinclair also argues that to the extent the designation of Mediacom's 2006 retransmission consent complaint as "permit-but-disclose" appropriate, the situation is different today because the issues presented were resolved three years ago. However, as is readily apparent from even a cursory review, Mediacom's complaint and interim carriage request present factual and legal arguments that are distinct from those raised in the 2006 dispute. Among other things, Mediacom's complaint and interim carriage request present compelling legislative history evidence that Congress intended for the Commission to be more assertive in protecting consumers from service disruptions arising from retransmission consent disputes – evidence that was not addressed in what Sinclair refers to as "*Mediacom I*."

Finally, Sinclair falsely argues that the designation of Mediacom's 2006 retransmission consent complaint as "permit-but-disclose" resulted in Mediacom "routinely" making "unauthorized filings." Mediacom's communications with the Commission were fully consistent

[1] *See* Public Notice, DA 06-2274 (Nov. 8, 2006) (granting permit-but-disclose status to retransmission consent complaint proceeding).

with and authorized by the designation of that proceeding as permit-but-disclose; furthermore, Sinclair ignores the fact that it also engaged in numerous *ex parte* communications during that proceeding. While Mediacom disagrees with the Media Bureau's decision in *Mediacom I*, designation of that proceeding as permit-but-disclose designation clearly served the public interest by facilitating the submission of relevant information to the Commission not only by Mediacom and Sinclair, but also by other interested parties, including elected officials, consumers, and industry.

In light of the foregoing, Mediacom urges the Commission to act without further delay and immediately issue an order designating Mediacom's retransmission consent complaint and interim carriage request as "permit-but-disclose."

Respectfully submitted,

MEDIACOM COMMUNICATIONS CORPORATION

By: 

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Its Attorneys

Date: November 5, 2009

207136

CERTIFICATE OF SERVICE

I, Glenda Thompson, a secretary at the law firm of Fleischman and Harding LLP, hereby certify that copies of the foregoing "Reply" were served this 5th day of November, 2009, via certified mail, return receipt requested, upon the following:

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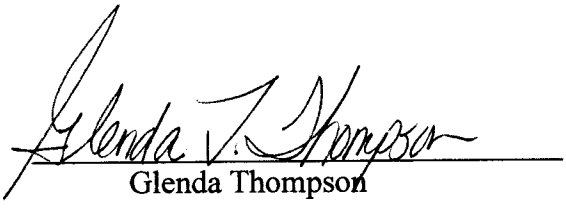

Glenda Thompson

* Via electronic mail delivery
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ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

Mediacom Communications Corporation,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	CSR No. 8234-M
Sinclair Broadcast Group, Inc.,	)	
	)	EXPEDITED TREATMENT REQUESTED
	)	
Defendant.	)	
	)	

To: The Commission

PETITION FOR AN EMERGENCY ORDER GRANTING INTERIM CARRIAGE RIGHTS

By its attorneys and pursuant to Sections 4(i) and 325(b) of the Communications Act of 1934, as amended, and Sections 76.7 and 76.65 of the Commission's rules, Mediacom Communications Corporation ("Mediacom") hereby petitions the Commission for an emergency order granting Mediacom interim carriage rights with respect to various television broadcast stations whose retransmission consent rights are controlled by Sinclair Broadcast Group, Inc. ("Sinclair") pending final resolution of Mediacom's Retransmission Consent Complaint ("Complaint") against Sinclair, filed concurrently herewith. As is more fully set forth below, an immediate grant of the requested relief is necessary to reassure hundreds of thousands of Mediacom's customers that their access to Sinclair's stations is not going to be disrupted, thereby preventing avoidable confusion and economic harm and effectively preserving the *status quo*. The requested relief is particularly important to protect those Mediacom customers who, as a result of the recent transition of broadcast television from analog to digital, no longer have the ready alternative of viewing Sinclair's television stations via over-the-air reception. Moreover, under the terms of the relief sought by Mediacom, there is no risk of irreparable harm to Sinclair.

DISCUSSION

I. An Interim Carriage Order that Maintains the *Status Quo* During the Pendency Of Mediacom's Complaint Is Necessary to Protect Hundreds of Thousands of Mediacom's Customers From Avoidable Disruptions to Their Service and Unnecessary Confusion and Expense.

1. As set forth in the attached Complaint, Sinclair's conduct in its retransmission consent negotiations with Mediacom, based on the totality of the circumstances, constitutes a violation of its duty to negotiate in good faith under Section 325(b)(3) of the Communications Act and Section 76.65 of the Commission's rules. Specifically, Sinclair has demanded from Mediacom outrageous and discriminatory retransmission consent terms that are not representative of competitive marketplace considerations and current economic conditions and that reflect an abuse of market power arising from relationships between Sinclair and other stations that are incompatible with national policies favoring competition.

2. Furthermore, Sinclair has made clear to Mediacom that if Mediacom does not accept Sinclair's unreasonable terms and conditions, Sinclair will demand, effective 12:01 AM on January 1, 2010, that Mediacom cease its retransmission of more than 20 stations over which Sinclair asserts retransmission consent rights, blocking more than 700,000 households served by Mediacom (representing more than 1.5 million television viewers) from receiving, as part of their cable service, one or more of the local stations licensed to serve those viewers in the public interest. Grant of the requested interim carriage relief is necessary to maintain the *status quo* and thus prevent an avoidable disruption of service to Mediacom's customers while the important issues raised in the Complaint are considered and resolved, either by the Commission (following the designation of contested issues for a hearing before an Administrative Law Judge if deemed necessary and appropriate) or through mandated alternative dispute resolution.

3. To appreciate the harm that will befall Mediacom's customers should the Commission not grant the instant request, one need only look at the events of three years ago. In 2006, Mediacom and Sinclair reached an impasse over retransmission consent that led to the filing of a complaint by Mediacom and the subsequent month-long loss of access to 22 Sinclair-controlled stations for roughly

half of Mediacom's 1.4 million customers. During the period in which Sinclair barred Mediacom from retransmitting local Sinclair stations, most Mediacom customers simply went without those stations or attempted to receive them over the air using rabbit ears and A/B switches. A smaller, but not insignificant number of customers elected to cancel their cable service with Mediacom, presumably in order to switch to a competing multichannel video programming distributor (such as DirecTV or DISH Network) that had obtained retransmission consent rights from Sinclair.

4. While switching to a competing video service may have allowed some of Mediacom's customers to continue to receive local Sinclair stations, making that switch was disruptive to those customers both in terms of the effort needed to install the new service and in terms of monthly service and equipment costs. Moreover, while nearly all Mediacom customers receive service on "at-will" basis and may terminate their relationship with Mediacom at any time, DBS customers frequently have to commit to a fixed-term contract with penalties for early termination.

5. The harm suffered by nearly three-quarters of a million innocent Mediacom customers three years ago could have been avoided had the Commission issued an interim carriage order that would have maintained the *status quo* pending resolution of Mediacom's complaint. Mediacom sought such an order but the Media Bureau, acting at the direction of then-Chairman Martin, denied Mediacom's request, thereby allowing Sinclair to use Mediacom's customers as leverage in its negotiations with Mediacom.[1] As discussed in Section II of this Petition, the Bureau's rulings on this issue, which were never reviewed by the full Commission, were inconsistent with Commission precedent and directly at odds with the legislative history of Section 325(b)(3).

6. While what happened at the end of 2006 provides reason enough for the Commission to issue the requested interim carriage order so as to prevent Sinclair from disrupting Mediacom's customers' access to local signals pending the final resolution of Mediacom's Complaint, the case for the immediate issuance of such an order is even more compelling today as a result of the broadcast

[1] *Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.*, Memorandum Opinion and Order, 22 FCC Rcd 35 (MB, 2007) ("*Mediacom I*"). *See also Mediacom Communications Corporation v. Sinclair Broadcast Group, Inc.*, Order, 22 FCC 284 at ¶ 3 (MB, 2007).

industry's June 2009 transition from analog to digital. As noted above, three years ago, many of Mediacom's customers dealt with Sinclair's decision to deny them access to local signals via their cable service by relying on rabbit ear antennas. Today, however, rabbit ears alone won't suffice. A great many of Mediacom's customers would need a new television, or at the very least a digital converter (for which government rebate coupons are no longer available) as well as a properly oriented rooftop antenna in order to receive Sinclair's signals via over-the-air reception.

7. Thus, allowing Sinclair to cut off Mediacom's customers' access to local broadcast signals pending resolution of Mediacom's Complaint would be infinitely more disruptive and expensive today than it was at the end of 2006. The government sponsored rebate program for digital converters has ended and the boxes themselves are likely to be in short supply. And it not only is unreasonable to expect consumers to install rooftop antennas in the dead of winter, it is dangerous to put them in the position of having to do so.

8. Moreover, there is the issue of consumer confusion. In addition to providing subsidized converter boxes, the federal government, spent hundreds of millions of dollars mounting an intensive consumer education campaign designed to minimize the risk that, as a result of the digital transition, consumers would lose access to over-the-air broadcast stations for even one day.[2] As a result, many consumers may have elected to forego the government-issued coupons because they concluded that if they were, or became, cable subscribers, they would have uninterrupted access to their local broadcast stations.

9. Under the circumstances, it would be unconscionable for the Commission to sit idly by while hundreds of thousands of cable customers who only six months ago were being assured by the government that they did not have to get a digital converter or other new equipment in order to receive broadcast signals post-transition were left high and dry during the pendency of Mediacom's

[2] *See, e.g.*, 47 C.F.R. § 76.1630 (requiring cable operators to provide notice to subscribers explaining digital transition to subscribers, including fact that televisions connected to cable service "should continue to work as before").

Complaint. The Commission's responsibility to ensure a seamless digital transition and to protect consumers from confusion, unnecessary expense, and disruptions of service did not end on June 12.

10. While the discussion above focuses on the harm that will befall consumers if the Commission does not grant the requested relief, the Commission should not ignore the potential harm to Mediacom. Not only will Mediacom lose customers (as was the case during its 2006 dispute with Sinclair), but it also will suffer an irreparable loss of consumer goodwill that will start as soon as word of the threatened shut-off of service begins reaching its customers and will not be remedied if and when the adjudication of Mediacom's retransmission consent complaint is complete.

11. In contrast, Sinclair will suffer no harm since Mediacom hereby acknowledges its willingness to pay Sinclair an amount based on Mediacom's original offer during the pendency of its complaint and to "true up" the total amount due when a final rate is established. This is similar to the approach taken by the Commission in the retransmission consent condition that it imposed on News Corp. in conjunction with the Commission's approval of the News Corp./Hughes merger in 2004.[3]

12. Under well-settled principles, requests for injunctive relief that would maintain the *status quo* are evaluated under a four-part test that examines (i) the likelihood that the petition will succeed on the merits; (ii) whether the petitioner will suffer irreparable harm absent the requested relief; (iii) whether grant of the relief will substantially harm other parties; and (iv) whether the public interest will be served by grant of the requested relief.[4] The instant petition clearly satisfies each of these factors. Moreover, "[t]hese factors interrelate on a sliding scale and must be balanced against each other."[5] Thus, an order maintaining the *status quo* is appropriate where a serious legal question

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[3] *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation, Limited, Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, 572-75 (2004) ("*News/Hughes Order*"). Under the condition, where an MVPD and News Corp. were unable to reach an agreement on the renewal of a retransmission consent agreement, the matter was submitted to arbitration and News Corp. was required to grant the MVPD interim carriage based on the terms of the existing agreement, subject to a true-up after the dispute was resolved. *Id.* Mediacom's offer to compensate Sinclair based on Mediacom's original renewal offer goes further than the *News Corp./Hughes Order* condition since that offer would increase the compensation that Sinclair receives under the existing agreement.

[4] Washington *Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F. 2d 841, 842 (D.C. Cir. 1977) ("*WMATC*").

[5] *In re Verizon Internet Services, Inc.*, 257 F.Supp. 2d 244, 268 (D.D.C. 2003).

has been presented and there is substantial equity, whether or not the moving party has shown a "mathematical probability of success."[6] Mediacom's Petition plainly satisfies this standard.

II. The Commission Has the Requisite Authority to Grant the Requested Relief.

13. Notwithstanding the Media Bureau's decision not to grant Mediacom's request for an interim carriage order in 2006, it is well within the Commission's authority to grant the requested relief. In particular, the Bureau's decision ignored relevant statutory and regulatory provisions, Commission precedent, and explicit legislative history regarding the Commission's power and responsibility to protect consumers from service disruptions arising out of retransmission consent disputes.

14. First, as a general matter, the Commission possesses broad authority under Section 4(i) of the Communications Act to "perform any and all acts...not inconsistent with this Act, as may be necessary in the execution of its functions."[7] One of the Commission's functions is to adjudicate complaints alleging a violation of the requirement that a broadcaster engage in good faith retransmission consent negotiations. Practically speaking, the Commission could not effectively carry out this duty if it did not have the authority to order interim carriage. Indeed, if the good faith rule did not contain within it the implicit right for the Commission to order interim carriage while a complaint was pending, the rule would fail to offer complainants a remedy where a television broadcaster refused to negotiate in good faith prior to the expiration of an existing agreement and ended cable carriage of its station to maximize its leverage in the negotiations (as Sinclair did in 2006 and is threatening to do again).

15. Second, Sections 76.7(e) and 76.7(g) of the Commission's rules expressly confer on the Commission and its staff the authority not only to utilize procedural mechanisms such as adjudicatory hearings before an administrative law judge or alternative dispute resolution to resolve complaint proceedings, but also to order such temporary relief during the pendency of such

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[6] *WMATC*, 559 F.2d at 844.

[7] 47 U.S.C. § 154(i).

proceedings as is deemed appropriate. There is no basis for excepting retransmission consent complaints from the scope of this authority.

16. Third, the Commission's own decisions confirm its authority to take such steps as are necessary to ensure uninterrupted service to the public during the pendency of a retransmission consent dispute. In this regard, it is notable that while the Media Bureau claimed that it lacked the authority to issue an interim carriage order in the 2006 Mediacom/Sinclair dispute, the Bureau simultaneously stated that it would issue precisely such an order if the parties agreed to binding arbitration before the Bureau.[8] Thus, the Bureau's decision not to grant the requested relief was itself internally inconsistent.

17. Furthermore, the Bureau's assertion that it lacked the authority to order interim carriage was inconsistent with existing Commission precedent. Specifically, in the order approving News Corp.'s acquisition of DirecTV, the Commission addressed concerns about News Corp.'s potential abuse of market power in retransmission consent negotiations by granting cable operators an interim carriage right in order to maintain the *status quo* pending resolution of the dispute through a baseball-style arbitration proceeding.[9] If the Commission can order interim carriage to maintain the *status quo* in circumstances where a merger creates a risk of market power abuse, it certainly can do the same in other cases where a cable operator alleges that a broadcaster is abusing its relationships with other stations in order to force the cable operator to accept retransmission consent terms and conditions that are not consistent with competitive marketplace conditions.

18. Finally, the legislative history of Section 325(b) leaves no doubt regarding the Commission's authority to take such steps as are needed to prevent broadcasters from using their retransmission consent rights to disrupt cable customers' access to local television stations. During the debate over the enactment of the retransmission consent provisions of the 1992 Cable Act, Congressional leaders expressly discussed the issue of "what will happen if a local station is unable to reach an agreement with the local cable operator, which could result in the loss of local programming

[8] *Mediacom I, supra*, at ¶ 25.

[9] *News/Hughes Order, supra*, 19 FCC Rcd at 572-75.

to cable subscribers."[10] Responding to this and similar inquiries, Senator Inouye, floor manager of the 1992 Act and the author of the retransmission consent provision, noted that "universal availability of local broadcast signals" was a major goal of the legislation.[11] Thus, according to Senator Inouye and the other cosponsors of the legislation, in the rare situation where a retransmission consent dispute threatens the public's access to local broadcast stations, "the FCC has the authority under the Communications Act" to "ensure that local signals are available to all the cable subscribers."[12] No member of Congress offered a contrary view.[13]

19. The Bureau's orders denying Mediacom's 2006 request for interim carriage did not acknowledge or otherwise address this legislative history. Moreover, the Bureau's orders were issued prior to the Commission's receipt of a letter sent to then-Chairman Martin dated January 30, 2007 from Senators Inouye and Stevens (the Chairman and Vice Chair of the Commerce Committee, respectively) in which they reaffirmed that the Communications Act gives the Commission authority to prevent disruptions of service during retransmission consent disputes, emphasizing that "[a]t a minimum, Americans should not be shut off from broadcast programming while the matter is being negotiated among the parties and is awaiting [Commission resolution]."[14]

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[10] 138 Cong. Rec. S643 (Jan. 30, 1992) (Sen. Burdick); *see also id.* ("If a local broadcast station and a cable operator are unable to come to terms on an agreement to carry that station's signal, some consumers may not be able to receive local programming....How can we be sure that consumers will continue to receive the signals of the local broadcast stations if the local broadcaster and the local cable operator cannot reach agreement on the terms of carriage?") (Sen. Adams).

[11] *Id.* (Sen. Inouye).

[12] *Id.* Significantly, the assurances given by Senator Inouye during this debate were cited by Senator Wellstone as the basis for his decision not to offer an amendment that would have expressly required the Commission to adopt rules to ensure that the exercise of retransmission consent does not result in the "loss of any local broadcast signal carried by a cable operator on the date of enactment [of Section 325 (b)]." *Id.* (Sen. Wellstone).

[13] Indeed, Senator Lautenberg stated on the floor of the Senate that it was his understanding, based on discussions with the Commerce Committee, that "if a broadcaster is seeking to force a cable operator to pay an exorbitant fee for retransmission rights, the cable operators will not be forced to simply pay the fee or lose retransmission rights. Instead, cable operators will have an opportunity to seek relief at the FCC.") 138 Cong. Rec. S14615-16 (Sept. 22, 1992) (Sen. Lautenberg).

[14] *See* Complaint, Exhibit A, Letter from Senators Inouye and Stevens to Kevin Martin, Chairman, Federal Communications Commission, dated January 30, 2007.

III. The Commission Should Grant the Requested Relief Without Delay.

20. Although Mediacom's current retransmission consent agreement with Sinclair does not expire until December 31, 2009, it is essential that the Commission act without delay to grant Mediacom's request for an order granting it interim carriage rights. If the Commission fails to act promptly, the harms to Mediacom and its customers detailed above will occur even before Mediacom is required to cease retransmissions of Sinclair's stations.

21. This is because the filing of Mediacom's Complaint instantly will be the subject of news stories in the communities served by Mediacom – stories that undoubtedly will rehash the events of three years ago, leading consumers to fear that they once again could lose access to Sinclair's stations. Moreover, the filing of Mediacom's Complaint almost certainly will prompt Sinclair to mount a public relations campaign aimed at scaring Mediacom's customers into believing that they face an imminent loss of service if they do not switch service providers. This is a tactic that has been used by broadcasters in the case of virtually every retransmission consent dispute in the past decade and a half and was used by Sinclair against Mediacom in 2006. Also, as it did in 2006, Sinclair may enter into a "bounty payment" relationship with one or more of Mediacom's competitors under which Sinclair receives a payment for every former Mediacom customer that switches to a new service provider.

22. An immediate grant of the instant request for relief is crucial in order to restrain Sinclair from engaging in deceptive advertising and other marketing tactics that will confuse Mediacom's customers and cause them to take unnecessary action and bear unnecessary expense even before the end of the year. If for any reason the Commission is not inclined to act promptly, it should at minimum stay Sinclair from engaging in the types of advertising and marketing campaigns described above while the current contract is still in effect.

23. To repeat: no matter what the precise message and who delivers it, Mediacom's customers will be understandably concerned about the prospect of losing, for the second time in three years, access to local broadcast stations. The Commission can fulfill its responsibilities to the public

under the Communications Act by preventing the confusion, disruption and expense that will inevitably accompany that concern, but only if takes immediate action to maintain the *status quo* until such time as Mediacom's Complaint is finally resolved.

CONCLUSION

Sinclair has already proven its willingness to deprive hundreds of thousands of Mediacom's customers of access to its broadcast signals as a harsh negotiating tactic. The relief requested here will give the Commission time to resolve Mediacom's Complaint while protecting those customers from the expense, confusion and disruption – exacerbated by the recent digital transition – that will otherwise occur.

Undersigned counsel have read the foregoing Petition for an Emergency Order Granting Interim Carriage Rights, and to the best of such counsels' knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and is not interposed for any improper purpose.

Respectfully submitted,

MEDIACOM COMMUNICATIONS CORPORATION

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Its Attorneys

Date: October 22, 2009

206936/2

CERTIFICATE OF SERVICE

I, Sabrina Carter, a secretary at the law firm of Fleischman and Harding LLP, hereby certify that copies of the foregoing "Petition for an Emergency Order Granting Interim Carriage Rights" were served this 22nd day of October, 2009, via certified mail, return receipt requested, upon the following:

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Sinclair Broadcast Group, Inc.
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Sabrina Carter

*Via electronic mail delivery

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ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

Mediacom Communications Corporation	)	
	)	
Complainant	)	
	)	
v.	)	
	)	CSR No. 8234-M
	)	
Sinclair Broadcast Group, Inc.	)	
	)	
Defendant	)	

To: The Commission

OPPOSITION TO PETITION FOR EMERGENCY ORDER GRANTING INTERIM CARRIAGE RIGHTS

Sinclair Broadcast Group, Inc. ("Sinclair"), by its attorneys, hereby opposes the "Petition for Emergency Order Granting Interim Carriage Rights" (the "Petition"), filed October 22, 2009 by Mediacom Communications Corporation ("Mediacom"). Mediacom asks the FCC to issue an order "granting Mediacom interim carriage rights" to retransmit the signals of stations Sinclair owns or to which Sinclair provides services, while the FCC resolves a complaint Mediacom simultaneously filed against Sinclair.

The problems with Mediacom's request are manifold, but two reasons will suffice in response. First and foremost, the FCC does not have the authority to force the retransmission of broadcast signals without the consent of the broadcaster and Mediacom has presented no law or precedent that would permit such a radical outcome. Although Mediacom argues that the Media Bureau was wrong when it denied Mediacom's 2006 demand for FCC-mandated carriage of Sinclair's stations, the fact is that the FCC has never ordered a station to permit carriage without its consent. In denying Mediacom's last request, the Media Bureau was simply following the language of the Communications Act and the direction of the Commission, which has repeatedly

concluded that it lacks authority to permit carriage absent a station's consent. Section 325(b)(1) of the Communications Act provides that "[n]o cable system . . . shall retransmit the signal of the broadcasting station, or any part thereof, ***except . . . with the express authority of the originating station*** . . . ." 47 U.S.C. § 325(b)(1) (emphasis added). The FCC has acknowledged the clarity of this statutory language, concluding there is "no latitude for the Commission to adopt regulations permitting retransmission during good faith negotiation or while a good faith or exclusivity complaint is pending before the Commission where the broadcaster has not consented to such retransmission." *See Implementation of the Satellite Home Viewer Improvement Act of 1999*, 15 FCC Rcd 5445, at ¶ 60 (2000). In the same order the FCC wrote:

> [U]pon expiration of an MVPD's carriage rights under . . . an existing retransmission consent agreement, ***an MVPD may not continue carriage of a broadcaster's signal while a retransmission consent complaint is pending at the Commission*** . . . . * * *

Id. at ¶84 (emphasis added). Accordingly, the FCC cannot grant Mediacom's request.

Even if the FCC had authority to order interim carriage there would be no reason to do so here. Mediacom's existing agreement with Sinclair assures continued carriage through December 31, 2009, which leaves plenty of time for the FCC to resolve Mediacom's complaint (or for Mediacom to return to the bargaining table of its own accord). From the face of Mediacom's complaint it is apparent that Mediacom has carriage today and that Sinclair has offered terms on which Mediacom can obtain uninterrupted carriage. It is negotiating leverage, not carriage, that Mediacom wants from the FCC. Specifically, Mediacom wants the FCC to grant "interim" carriage at a price to be set by Mediacom.

The FCC does not have authority to grant this kind of relief, and there would be no cause to exercise such authority here if the FCC had it.

Respectfully submitted,

SINCLAIR BROADCAST GROUP, INC.

By: _____
Clifford M. Harrington
John K. Hane
Paul A. Cicelski
Its Attorneys

PILLSBURY WINTHROP SHAW PITTMAN LLP
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Dated: November 5, 2009

CERTIFICATE OF SERVICE

I, Julia Colish, a secretary with the law firm of Pillsbury Winthrop Shaw Pittman LLP, hereby certify that copies of the foregoing "**OPPOSITION TO PETITION FOR EMERGENCY ORDER GRANTING INTERIM CARRIAGE RIGHTS**" was served via U.S. mail on this 5th day of November 2009 to the following:

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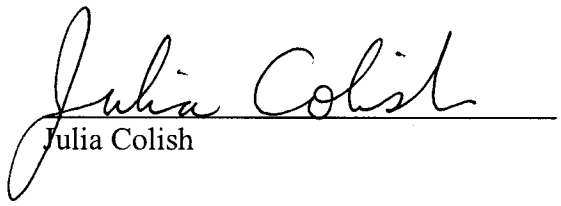

Julia Colish

*Via Hand Delivery

ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

FILED/ACCEPTED

NOV 13 2009

Federal Communications Commission
Office of the Secretary

Mediacom Communications Corporation,	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	CSR No. 8234-M
Sinclair Broadcast Group, Inc.,	)	
	)	EXPEDITED TREATMENT
	)	REQUESTED
Defendant.	)	
	)	

To: The Commission

REPLY

Mediacom Communications Corporation ("Mediacom"), by its attorneys, hereby submits its Reply to the Opposition filed by Sinclair Broadcast Group, Inc. ("Sinclair") to Mediacom's Petition for Emergency Order Granting Interim Carriage Rights ("Petition"). For the reasons set forth in the Petition and below, the Commission should act without further delay to grant the requested relief.

On October 22, 2009, Mediacom filed with the Commission a Retransmission Complaint alleging that Sinclair had violated its duty to engage in good faith retransmission consent negotiations with Mediacom. Concurrently, Mediacom filed the Petition, wherein it urged the Commission to protect Mediacom's subscribers from a disruption in their access to Sinclair's stations by directing Sinclair to grant Mediacom interim carriage rights pending the resolution of Mediacom's Complaint. Mediacom demonstrated conclusively in the Petition that the

Commission had the legal authority to take action to maintain the *status quo ad litem* and that the facts warranted such action under the usual four-part test for injunctive relief.

In its Opposition, Sinclair has made virtually no effort to address the legal and factual arguments presented in Mediacom's Petition. Instead, Sinclair summarily contends that the Commission lacks the legal authority to protect the public from service disruptions during the pendency of a retransmission consent complaint and that, in any event, such intervention is unnecessary here. Sinclair is wrong on both counts.

First, Sinclair's argument that the Commission does not have the authority to grant the requested relief flies in the face of the Communications Act and its legislative history as well as judicial and administrative precedent. The Communications Act directs the Commission to "execute and enforce" the provisions of the Communications Act.[1] To this end, the Act expressly authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[2] Mediacom's retransmission consent complaint calls on the Commission to hold Sinclair to its duty of good faith negotiation under the Communications Act and the Commission's rules. It would be an absurd result, wholly at odds with the broad grants of authority cited above (and also with section 76.7(e) of the Commission's rules), for the Commission to conclude that it had no power to prevent the harm to the public – loss of service – that inevitably follows a violation of that statutory and regulatory obligation.[3]

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[1] 47 U.S.C. § 151.

[2] 47 U.S.C. § 154(i).

[3] *See* 47 C.F.R. § 76.7(e) (authorizing Commission to grant temporary relief during the pendency of a complaint proceeding).

Moreover, the fact that the Commission decided in 2000 not to adopt a generally applicable rule mandating continued carriage during retransmission consent disputes must be considered in light of the entire legislative history of the retransmission consent provision and the well-settled proposition that the Commission has "very broad discretion whether to proceed by way of adjudication or rulemaking" in carrying out its responsibilities under the Act.[4] As the Petition describes in detail, the Commission's authority "to ensure that local signals are available" was confirmed during the debate over the enactment of the retransmission consent right and has subsequently been reconfirmed by Congressional leaders.[5] Indeed, it was on the basis of assurances that the Commission already had the necessary case-by-case authority to protect the public from service disruptions that a proposal to require a more generally applicable rule was withdrawn.[6] And while the Commission eschewed the adoption of a generally applicable rule in its subsequent implementation of the good faith negotiation provision, nothing in the Act or the Commission's orders – including the *Mediacom I* decision – supports the conclusion, inherent in Sinclair's argument, that Congress intended the subsequent enactment of the good faith negotiation standard to restrict the Commission's previously recognized authority to protect the public from a loss of service during the pendency of a retransmission consent dispute through the issuance of an order maintaining the *status quo*.[7]

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[4] *Time Warner Entertainment Co. v. FCC*, 240 F. 3d 1126, 1141 (D.C. Cir. 2001). *See also NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

[5] Petition at 7-8, *citing* 138 Cong. Rec. S643 (Jan 30, 1992) (Senators Burdick and Inouye). *See also* Petition at Ex. A, Letter from Senators Inouye and Stevens to Kevin Martin, Chairman, Federal Communications Commission, dated January 30, 2007.

[6] *Id.*, *citing* 138 Cong. Rec. S643 (Jan. 30, 1992) (Sen. Wellstone). *See also id., citing* 138 Cong. Rec. S14615-16 (Sen. Lautenberg).

[7] As discussed in the Petition, the *Mediacom I* decision, relied on by Sinclair in its Opposition, is precedential support for the Commission's authority to grant the temporary relief sought here. Specifically, in the *Mediacom I* order, the Media Bureau expressly stated that it would "require Sinclair to authorize Mediacom's continued carriage of its stations' signals" if both sides submitted to binding arbitration of their dispute before the Bureau. *Mediacom*

Second, Sinclair's back-up argument – namely that there is no need for the Commission to grant the requested relief – is totally at odds with, and rebutted by the Petition's compelling factual showing to the contrary. It is particularly notable that Sinclair has ignored the significance of the digital transition. If the dispute between Mediacom and Sinclair is not fully and finally resolved prior to December 31, 2009, hundreds of thousands of Mediacom customers will lose access to Sinclair stations. In the past, where service disruptions occurred as the result of a retransmission consent dispute, the impact on the pubic was somewhat mitigated by the availability to many viewers of over-the-air reception via a set of rabbit ears. Today, however, most of Mediacom's customers lack the equipment necessary to receive a digital signal over-the-air and merely handing out rabbit ears will not change that.[8] As stated in the Petition, the Commission's responsibility to ensure a seamless digital transition and to protect consumers from confusion, unnecessary expense, and disruptions of service did not end on June 12.

To be sure, Mediacom is hopeful that this dispute can be resolved before December 31, 2009 and is willing to participate in a process that might facilitate such an outcome, such as mediation or another form of alternative dispute resolution. However, in making out a *prima facie* case of a violation by Sinclair of its good faith negotiation duty, Mediacom's complaint presents substantial factual and legal issues that are not likely to be resolved without discovery and the crucible of an evidentiary hearing (whether before the Commission or an administrative

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Communications Corporation v. Sinclair Broadcast Group, Inc., 22 FCC Rcd 35 (MB, 2007). *See also Time Warner Cable*, 15 FCC Rcd 7882 (CSB, 2002) (ordering carriage of a local broadcast station in the absence of a written retransmission consent agreement in order to address alleged violation of the "no drops during sweeps" rule). *Cf. Time Warner Cable,* 21 FCC Rcd 8808 (MB, 2006) (ordering temporary carriage of programming network pending resolution of complaint alleging violation of subscriber notice rule despite absence of written carriage agreement).

[8] Mediacom estimates that hundreds of thousands of its subscribers would have to spend $100 or more for the equipment needed to access Sinclair's digital signals over-the-air (and would have to incur considerable inconvenience in installing such equipment).

law judge).[9] Given that Mediacom's Petition contains a factual showing satisfying the usual test for injunctive relief – and given that Sinclair has essentially failed to contest that showing – the Commission can and should grant the requested relief now in order to provide the public with advance reassurance that they will not face a loss of service during the pendency of this matter.

Respectfully submitted,

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Its Attorneys

Date: November 13, 2009

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[9] In addition, an offer submitted by Sinclair to Mediacom subsequent to the filing of Mediacom's Complaint raises additional legal and factual answers that will be addressed by Mediacom in its Reply and that will require a thorough examination by the Commission.

CERTIFICATE OF SERVICE

I, Jennifer M. Walker, a secretary at the law firm of Fleischman and Harding LLP, hereby certify that copies of the foregoing "Reply" were served this 13th day of November, 2009, via certified mail, return receipt requested, upon the following:

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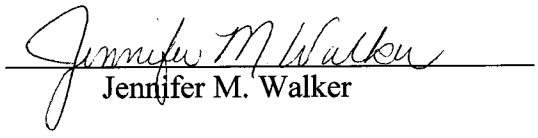

Jennifer M. Walker

*Via electronic mail delivery

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